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91-1989

Supreme Court, U.S.
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CASE NO.:

in the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN WESLEY MARKS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

By:_____
H. Collins Forman, Jr., Esq.

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QUESTIONS PRESENTED FOR REVIEW

I.

May a disorderly conduct statute which has been declared by a federal appeals court to be facially unconstitutional be used by the state courts to convict a street preacher simply because with his unaided human voice he was "too loud"?

II.

May a state trial court refuse to follow controlling United States Supreme Court and Florida Supreme Court precedents regarding free speech and convict an otherwise peaceful protestor of disorderly conduct?

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PARTIES

The names of all parties appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

Petitioner, JOHN WESLEY MARKS, respectfully prays that this Honorable Court grant Certiorari to review his conviction for disorderly conduct by the County Court in and for Palm Beach County Florida, the per curiam affirmance of the conviction by the Fifteenth Judicial Circuit in and for Palm Beach County acting in its review capacity and the denial of a Petition for Common Law Writ of Certiorari of the District Court of Appeal of the Fourth District of Florida entered in this cause on March 6, 1992.

REFERENCE TO REPORTS OF OPINIONS BELOW

None of the decisions rendered in this cause is reported. Marks was convicted of disorderly conduct *on* March 16, 1990 because he protested too loudly. (*See* Appendix 4). Marks was sentenced by the trial court on April 6, 1990 (*See* Appendix 3) Marks' conviction was per curiam affirmed without opinion on September 20, 1991 (*See* Appendix 2). Marks' Petition for Writ of Common Law Certiorari to the Fourth District Court of Appeal was denied without opinion. (*See* Appendix 1).

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

a) The conviction sought to be reviewed was entered March 16, 1990 and final appellate review was exhausted on March 6, 1992.

b) No Petition for Rehearing has been filed. No extension of the time within which to petition this Court for Writ of Certiorari has been requested.

c) The statutory provision which confers jurisdiction on this Court to review the conviction in question is 28 U.S.C. section 1257, which provides for review by Writ of Certiorari from a final decision by the highest court of the State in which a decision could be had, where the statute of any state is drawn into question on the ground of its being repugnant to the Constitution of the United States or where any title, right or privilege or immunity is specially set up or claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Florida Statues section 877.03

Breach of the peace; disorderly conduct.

Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of a second degree, punishable as provided in s. 775.082 or s. 775.083.

STATEMENT OF THE CASE

I. Course of proceedings.

On June 10, 1989, John Wesley Marks was arrested for preaching outside of an abortion clinic and charged with violating Florida Statute section 877.03, a second degree misdemeanor. Marks received a five-day non-jury trial which was spread out over several months due to the trial court's docket. The trial court judge found MARKS guilty of violating the Florida Disorderly Conduct Statute because "the State may regulate the time, place and manner of speech, and I believe beyond a reasonable doubt that Pastor MARKS' speech and actions and *the volume of his speaking*

would tend to invade the rights of others to pursue their lawful activities, carrying on the business of the medical center, not just the Presidential Women's Center [sic]." (emphasis supplied) (*See* Appendix 4)

MARKS had also been arrested for and tried for blocking the sidewalk, however the trial court found him not guilty of that offense, and therefore that question is not before the Court.

The trial court set sentencing for April 6, 1990. MARKS filed a Motion for New Trial raising the constitutional issues set out herein. His motion was denied. At sentencing, the trial court withheld adjudication, sentenced MARKS to six months probation, 30 hours of community service and ordered that if he went back to the clinic and preached that he must "moderate his volume . . . and not protest in such a way as to disrupt the businesses at the [Presidential Medical] plaza or the [abortion clinic]."

Marks timely appealed his conviction to the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, again raising the constitutional issues set out herein. His conviction was per curiam affirmed without opinion on September 20, 1991.

Marks timely filed a Petition for a Writ of Common Law Certiorari to the Fourth District Court of Appeal in Florida once again raising the constitutional issues set out herein. An Order to Show Cause was issued, and the STATE OF FLORIDA raised a jurisdictional question in its Response. After having invited MARKS to address the jurisdictional question raised by the STATE OF FLORIDA in its Response to the Order to Show Cause, the Fourth District Court of Appeal summarily denied the Petition, without opinion. This Petition is being timely filed pursuant to

Supreme Court Rule 13.1. The question of the retroactive application of a criminal statute was not raised below.

In this Court, MARKS will be referred to by his name, Pastor MARKS, or Petitioner. The STATE OF FLORIDA will be referred to as the STATE or Respondent. References to the record will be by volume and page number, or by reference to the Appendix filed with this Petition.

II. Statement of the Facts.

There are no reported facts in this case, but the facts are not in dispute.

JOHN WESLEY MARKS is a Pastor at the 250 member Agape Temple Church of God, located in Loxahatchee, Florida. On June 10, 1989 at approximately 10:00 a.m. MARKS was at all times located on a public sidewalk in the 1500 block of Presidential Way in the City of West Palm Beach, Palm Beach County, Florida. Pastor MARKS was exercising his first amendment rights of free speech, freedom of religion and association as he preached against abortions which he believed were going on inside the Presidential Women's Clinic (hereafter CLINIC) located in the Presidential Medical Plaza on Presidential Way.

Pastor MARKS was vociferous in his preaching. An off-duty police officer who had been hired by the Clinic was present to insure that no altercations would result between the protestors and who were often present and the women going into the Clinic. There were about 15 other protestors at the Clinic that day. Pastor MARKS was the most vocal of them all. MARKS' protest could be heard inside the clinic and other offices in the medical plaza.

Pastor MARKS used the word "murderer" among others in his preaching which was directed to persons

coming from or going to the Clinic or to other persons within earshot. It was particularly the use of the word "murderer" in a loud voice that drew the attention of the off-duty police officer and other officers that were called to the arrest scene. MARKS was arrested for disorderly conduct because of the use of his word "murderer" in a loud manner.

REASONS FOR GRANTING CERTIORARI

I.

MARKS' CONVICTION OF DISORDERLY CONDUCT FOR PREACHING "TOO LOUD" CONFLICTS WITH CONTROLLING PRECEDENT OF THIS COURT REGARDING THE FIRST AMENDMENT.

Because Florida's Disorderly Conduct Statute punishes the use of words, it can only be valid when applied to words not protected by the First and Fourteenth Amendments. *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); *Gooding v. Wilson*, 405 U.S. 521, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). Unless the trial court had found Marks' words were within the well-defined narrowly limited class of speech not protected by the Constitution, i.e. obscenity, libel, or fighting words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace, which it did not, they were protected. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

Marks' words were spoken on a public side-walk, a traditional public forum. *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939); *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). Though in a public forum the government may impose reasonable time, place and manner regulations on speech so long as they are

content-neutral and narrowly tailored to serve a significant government interest, leaving open ample alternative channels of communication, *Id.*, no justification of serving a *public* interest was ever set forth by the State at trial or found to exist by the trial court.

The court below specifically found that Marks' words were not designed to, nor did they, inflict injury or incite an immediate breach of the peace (*See* Appendix 4, p. 4-3) i.e. they were *not* fighting words as a matter law under *Chaplinsky, supra; Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The court also found that Marks was "someone who is not by nature a criminal." (*See* Appendix 4, p. 4-3)

Florida Statute section 877.03 was declared unconstitutional on its face in *Weigand v. Seaver*, 504 F.2d 303 (1974) cert. den. and app dis'd ____U.S.____, 95 S.Ct. 1650, 44 L.Ed.2d 83 (1975). The First Amendment concerns raised here by MARKS were raised at every level of the proceedings. There is no justification for allowing Marks' conviction for disorderly conduct to stand, especially in light of the overwhelming authority from this Court which protects his preaching.

II.

MARKS' CONVICTION OF DISORDERLY CONDUCT FOR PREACHING "TOO LOUD" IGNORED THE LIMITING CONSTRUCTION PLACED ON THE STATUTE BY THE FLORIDA SUPREME COURT.

The Courts of the state of Florida have historically disagreed sharply with the Constitutional applicability of

Florida Statute section 877.03 to protected its speech activity.

The Florida Supreme Court has repeatedly attempted to address the constitutionality of the statute. The question of the statute's constitutionality was considered on a Petition for Writ of Habeas Corpus in *Severson v. Duff*, 322 F.Supp. 4 (M.D. Fla. 1970) and the court concluded that the language of Florida Statute section 877.03 unnarrowed by judicial construction was vague and overbroad.

The Florida Supreme Court disagreed in *State v. Magee*, 259 So.2d 139 (Fla. 1972) when it affirmed a conviction under Florida Statute section 877.03 for fornication in the front seat of an automobile. Hence the state courts found themselves in a state court versus federal court bind. *See State v. Migliaccio*, 38 Fla. Supp. 47, at 49 (17th Circuit 1972).

In *In re Fuller*, 255 So. 2d 1 (Fla. 1971), the Florida Supreme Court reversed an adjudication of delinquency based upon section 877.03 concluding Fuller's conduct and vulgar language were a mere angry altercation between the two individuals and a commotion which would not have breached the peace or public order. *Id.* at 4. In *Bradshaw v. State*, 286 So.2d 4 (Fla. 1973) a conviction under the statute was upheld though for different factual reasons. Convictions were reversed in the consolidated cases of *Gonzales v. Belle Glade* and *Smith and Sweet v. State*, 287 So.2d 669 (Fla. 1973) for insufficiency of evidence. Therein the court opined that a violation of Florida Statute section 877.03 requires more than a creation of a mere annoyance. *Id.* at 670.

In *Weigand v. Seaver*, 504 F.2d 303 (5th Cir. 1974), Florida Statute section 877.03 was held to be unconstitutional *on its face*. *Weigand* was an appeal from a writ of habeas corpus issued by a Florida District Court. The

Fifth Circuit opined that the test which has then emerged from the *Gonzales* and *Fuller* cases was based entirely on a factual issue of actual disruption i.e. the degree of disturbance rather that the type of speech.

The statute was again reconsidered by the Florida Supreme Court in *White v. State*, 330 So.2d 3 (Fla. 1976). The court determined that the statute required judicial narrowing in order to withstand a constitutional challenge on the grounds of overbreadth. It thereafter discussed special rules of decision applicable to cases where the statute makes speech punishable as a crime in *Spears v. State*, 337 So.2d 977 (Fla. 1976). The last authoritative pronouncement by the Florida Supreme Court on the statute was *State v. Saunders*, 339 So.2d 641 (Fla. 1976) where it held

> We now limit the application of Section 877.03 so that it shall hereafter only apply either to words which "by their very utterance . . . inflict injury or tend to incite immediate breach of the peace," *White v. State*, 330 So.2d at 7; *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86, L.Ed. 1031 (1942); or to words, known to be false, reporting some physical hazard in circumstances where such a report creates a clear and present danger of bodily harm to others. We construe the statute so that no other words except "fighting words" or words like shouts of "fire" in a crowded theatre fall within this proscription, in order to avoid the constitutional problem of overbreadth, and "the danger that a citizen will be punished as a criminal for exercising his right of free speech." *Spears v. State, supra*. 337 So.2d at 980. With these two exceptions, Section 877.03 should not be read to proscribe the use of language *in any fashion whatsoever.*

Saunders, 399 at 644 (emphasis supplied). Since *State v. Saunders*, there has been no reconstruction of Florida Statute section 877.03 by either the Florida Supreme Court or the District Courts of Appeal who now have jurisdiction over plenary appeals.

This case is the first time that Florida Statute section 877.03 has been utilized to punish the *manner* in which a person has chosen to preach, in direct contravention of the gloss placed on the statute by the Florida Supreme Court when it held that the use of words should not be proscribed "in any fashion whatsoever". *See Saunders*, at 644. Judge Schwartz's factual loudness test also contravenes *Weigand, supra*.

It is a departure from the specific pronouncement of the Florida Supreme Court that gives rise to the constitutional concerns raised here. Without the limitations that were placed on the statute by the Court in *Saunders*, the door is opened wide for criminal prosecution on a broad range of free speech activity previously recognized by this Court to be fundamentally protected.

III.

CERTIORARI IS NECESSARY TO AVOID AN UNCONSTITUTIONAL EXPANSION OF THIS COURT'S DECISIONS IN *WARD* AND *FRISBY*.

MARKS' only activity which prompted his conviction was the loudness of his preaching. The court found that the content of the preaching did not amount to fighting words. Nonetheless Judge Schwartz also gave the statute a novel and retroactive construction by finding MARKS' pure speech susceptible to criminal prosecution because it had been "too loud."

Judge Schwartz said his ruling was based on the reasonable regulation of time, space and manner of speech which were most recently addressed in this Court's holdings in *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed. 2d 420 (1988) and *Ward v. Rock Against Racism*, 479 U.S. ____, 109 S.Ct. 2746, 105 L.Ed. 2d 661 (1989). In doing so, the trial court has issued a broad invitation to other courts to construe the disorderly conduct statute in a manner which eviscerates fundamental free speech principals.

The power of the State to abridge freedom of speech on a public sidewalk has been limited by this Court's repeated pronouncements. *See Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed. 697 (1963); *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948); *Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed. 2d. 736 (1983).

In *Ward*, the focus of the inquiry was the same as *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949), namely the regulation of sound amplification devices. The most obvious feature that distinguishes MARKS' preaching from the speech involved in *Ward* or *Kovacs*, is the absence of any artificial means of amplification for his voice. This consideration impacts directly the application of the two prongs of the *Ward* test.

In the first instance, Florida Statute section 877.03 is not "narrowly tailored" as that term is explained in *Ward*.

> Only a disregard of vital differences between natural speech, even of the loudest spellbinders, and the noise of sound trucks [and by implication, music equipment] the constitutional rights accorded to the unaided human voice.

Kovacs, 336 U.S. at 96, 69 S.Ct. at 458 (Frankfurter, J., concurring). For obvious reasons, ordering one to lower one's voice so as not to disturb others lacks the objective element which exists with a sound control board completely with volume control devices or the exceeding of a particular decibel level at the property line.

Secondly, the final requirement in *Ward* of "ample alternative channels of communication" is directly violated by the regulation imposed in this case which bans loud preaching.

> [In such a situation] preference in the dissemination of ideas is given to those who obtain the support of newspapers, etc.; or those who have money enough to buy advertising from newspapers, radios, or moving pictures. The Court should no more permit this invidious prohibition against the dissemination of ideas by speaking and it would permit a complete blackout of the press, the radio, or moving pictures.

Kovacs, 336 U.S. at 103, 69 S.Ct. at 462 (Black, J., dissenting).

The criminalization of pure speech activity on a commercial city sidewalk is a distortion of this Court's narrow holding in *Frisby v. Schultz, supra.* " '[T]ime out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmarks of traditional public forum." *Hague v. C.I.O.*, 307 U.S. 496, 515, 59 S.Ct. 954, 963-64, 83 L.Ed. 1423 (1939). And this Court was careful to point out that this phrase is not a mere "cliche", and "stringent standards" must be applied to any governmental attempt to restrict free speech in such a public fora. *See Frisby, Id.* at 2500.

CONCLUSION

For the reasons stated herein, Petitioner JOHN WESLEY MARKS urges this Honorable Court to grant the Writ of Certiorari.

DATED:_____ Respectfully submitted,

By:_____
H. Collins Forman, Jr. Esq.
Counsel of record

Appendix

APPENDIX 1

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX A,
WEST PALM BEACH, FL 33402

CASE NO. 91-02985

L.T. CASE NO AP 90-0020 AC(A) 02 PALM BEACH

JOHN WESLEY MARKS

Petitioner(s),

vs.

STATE OF FLORIDA

Respondent(s).

March 6, 1992

BY ORDER OF THE COURT:

ORDERED that the Petition for Common Law Writ of Certiorari filed October 22, 1991, is hereby denied; further,

ORDERED that petitioner's Request for Oral Argument filed October 22, 1991, is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ MARILYN BEUTTENMULLER
MARILYN BEUTTENMULLER
CLERK.

cc: H. Collins Forman, Jr.
Attorney General-W. Palm Beach
State Attorney 15

/DM

APPENDIX 2

[FILED SEPT 23 1991]

IN THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. AP 90-0020 AC (A) 02

APPELLATE DIVISION (CRIMINAL)

JOHN WESLEY MARKS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Decision filed September 20, 1991

Appeal from the County Court for Palm Beach County; Robert Schwartz, Judge.

H. Collins Forman, Jr., of Watson Loving & Forman, P.A., Fort Lauderdale, for Appellant.

David Bludworth, State Attorney, and Robert S. Jaegers, Assistant State Attorney, West Palm Beach, for Appellee.

PER CURIAM.

AFFIRMED.

SHOLTS, LINDSEY and MOUNTS, JJ., concur.

APPENDIX 3

ORDER WITHHOLDING
ADJUDICATION OF GUILT
AND PLACING DEFENDANT ON PROBATION

IN THE COUNTY COURT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 89-15424MMA02

DIVISION: CRIMINAL

STATE OF FLORIDA

(plaintiff)

— vs —

JOHN MARKS

(defendant)

This cause coming on this day to be heard before me, and you, the defendant, John Marks being now present before me, and you having: BEEN FOUND GUILTY OF the offense of CT. 1 Disorderly Conduct

It appearing to the satisfaction of the court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and the welfare of society do not require that you should presently be adjudged guilty and suffer the penalty authorized by law;

Now, therefore, it is ordered and adjudged that the adjudication of guilt and imposition of sentence are hereby withheld, and that you are hereby placed on probation for a

period of 6 MONTHS under the supervision of Pride Halfway House, Inc. and its supervisors, such supervision to be subject to the provisions of the laws of this State.

It is further ordered that you shall comply with the following conditions of probation:

(1) You will not change your residence or employment or leave the county of your residence without first procuring the consent of your Probation Supervisor.

(2) Each month, during the period of probation, you will make a full and truthful report in person to your Probation Supervisor, unless otherwise directed by your Probation Supervisor.

(3) You will neither possess, carry, or own any weapons or firearms without first securing the consent of your Probation Supervisor.

(4) You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your probation.

(5) You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used unlawfully.

(6) You will work diligently at a lawful occupation and support any dependents to the best of your ability, as directed by your Probation Supervisor.

(7) You will promptly and truthfully answer all inquiries directed to you by the Court or the Probation Supervisor, and allow the Supervisor to

visit in your home, at your employment site or elsewhere, and you will comply with all instructions he or she may give you.

(8) You will pay thirty dollars ($30.00) per month toward the cost of this supervision and rehabilitation beginning on the date to be set by your Probation Supervisor.

(9) Unless modified by Court Order, all affirmative conditions of Probation will be completed no later than 14 days prior to completion of your probationary period.

(10) You will perform — NO — hours of community service, at the minimum rate of 5 hours per month.

☐ (11) (If checked) you will undergo a Substance Abuse Evaluation and complete any treatment/education program recommended by the Evaluator at your own expense.

(12) Pay fine and/or court costs, if any. ($80.25)

☐ (13) (If Checked) Pay Restitution for damages not covered by insurance, according to payment schedule to be determined. If you disagree with the amount of restitution, or the payment schedule, you must notify probation officer within 14 days so that a restitution hearing before the court can be scheduled.

(14) If deft. protests, protest not to be loud enough to disrupt business or any business at Presidential Women's Center or any business. To moderate Volumn of his protests so as not to disrupt ordinary course of business.

(15) Comply w/Terms of Permit.

You are hereby placed on notice that the Court may at any time rescind or modify any of the conditions of your probation or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation and impose any sentence which it might have imposed before placing you on probation.

It is further ordered that when you have reported to the Probation Supervisor and have been instructed as to the conditions of probation, you shall be released from custody if you are in custody and if you are at liberty on bond, the sureties thereon shall stand discharged from liability.

It is further ordered that the Clerk of this Court file this order in his office, and record the same in the Minutes of the Court.

DONE AND ORDERED IN OPEN COURT, this the 6 day of April, 1990.

/s/ [ILLEGIBLE]
JUDGE

I acknowledge that the conditions of probation have been explained to me.

Section 945.30 Florida Statutes requires: Anyone on probation or parole shall be required to contribute up to fifty dollars per month toward the cost of his supervision and rehabilitation beginning effective date of probation.

This 6 day of April, 1990

/s/ JOHN MARKS
JOHN MARKS
Probationer

ADJ. WITH
Schwartz

PR110

[1193]don't work there, I am not a murderer, my boss is not a murderer, I don't work there," and the pastor has posed a problem and you know, that's been indicative throughout the State's case and he hasn't been singled out.

They are just applying the law that we all have to live by to this man and I respectfully request that you find him guilty.

THE COURT: Thank you.

This has been a case that has been very difficult for me as a judge, partly because of the quality of the advocacy on both sides; partly because the witnesses on both sides are law abiding citizens who have strong beliefs that are contrary to one another — they are not classifiable as criminals.

We have a pastor who is on trial for a criminal offense; we also have two fundamental rights arising from the same parts of the Constitution, the Bill of Rights, and there is no amendment more revered by our people than the First Amendment which protects us in the freedom of exercising our religion and free speech.

So, that's why I could have wished [1194]to be able to let this case pass by me. Maybe had I seen it coming, I would have. Unfortunately, I didn't see it coming, so I have the case to be tried.

I don't see it quite the way either side sees it. I am not a partisan of either side. I am in a position where I can see both sides as having good people who are exercising their rights.

The easy decision is the first one I will make: The blocking of the sidewalk charge. I just don't think that based upon the evidence in the case that there is proof beyond a reasonable doubt that there was an intention to block the sidewalk. There are factors in the testimony of various people that could lead in that direction, but I just am not convinced beyond a reasonable doubt that Pastor Marks intended to block the sidewalk.

There is very interesting testimony by, I think it was Mr. Plunkett if I can find it — but in any case, I find him not guilty of that particular charge.

Though, like I said, I think it was [1195]Mr. Plunkett who testified that yes, he wanted to get people's attention to his sign.

So, I had that marked and starred and thought about that quite a bit in deciding this.

I'm also pretty familiar with what the Constitution requires here as to disorderly conduct and, I don't quite see it the way the State has interpreted it, but on the other side, I don't see it quite as the defense has interpreted it. I am not looking at the part that says "by their very utterance inflict injury," and so on.

However, I am looking at that chart there and in State v. White and other cases, the protection fails when the manner of the use of words invades the right of others who pursue lawful activities. I don't believe that the volume is irrelevant here. I think that the volume is the essence here. The contents of the speech, I believe, is upsetting and those words might be to people who are exercising their Constitutional rights as seen by the Supreme Court of the United States. However you like it or hate [1196]it, it's what the law of the land is right now.

But, I don't think that the contents of his protest is designed, or does, or should reasonably inflict injury or intend to incite immediate breach of peace, but his words void of their content, it's the manner of the use of the words, as testified to by State's witnesses and defense witnesses.

The volume — very interesting, by the way the pastor showed us in the courtroom, how he does it. By what Mrs. — I'm fatigued, so I am not as articulate as I would like to be in such an important case to me and to you, a case that is important to all of us.

But, what Susan Myer said, that the volume was so great that it disrupts the ordinary flow of business — she said you can't hear the telephone and there is a tremendous clamor.

The First Amendment and, in fact, I don't think there is any part of the Constitution that is absolute, even though the words tend to be written absolute — that Congress shall make no law, et cetera. I [1197]think the cases have said that the State may regulate the time, place and manner of speech, and I believe beyond a reasonable doubt that Pastor Marks' speech and actions and volume of his speaking would tend to invade the rights of others to pursue their lawful activities, carrying on the business at the medical center, not just the Presidential Women's Center.

I would have wished that this could have been done in a civil court rather than a criminal court, and that there could have been an instruction or some sort of other remedy suit because a criminal court is using kind of a hammer here to hammer someone who is not by nature a criminal.

But, I do not have a reasonable doubt about the disorderly conduct count and I find Reverend Marks guilty

of disorderly conduct and not guilty of blocking the sidewalk.

I am fatigued now, so I'm not all too sure this is a good time for me to have a sentencing hearing, although I can't imagine that the sentence would be in any way onerous [1198]in the sense of jail time or some other activity that would be reserved for criminals.

Furthermore, I expect this case will be appealed. Whenever you're dealing with First Amendment rights and fallible humans, I think that an appeal is likely.

So, I think I will set sentencing off to when I am more awake and I would like to set it for a time convenient to both parties.

I know the State is always here, so that is not a problem. Mr. Foreman, you're coming from Broward?

MR. FOREMAN: Yes, Your Honor.

THE COURT: Can you tell me when it would be appropriate to have sentencing on this case, to the extent that it's appropriate? I understand you disagree with this.

MR. FOREMAN: Let me look at my calendar. I am going out of town for a week, Your Honor. I don't know what my secretary has put on my calendar since I have been down—

THE COURT: Let me set a tentative time.

MR. FOREMAN: Sure, any time, Your Honor, next week, first week of April; any time in [1199]between doesn't really matter.

THE COURT: A good time for me would be April 6th, that's a Friday, before non-jury week. I have a very short calendar at that time and it would be a good time to hear the sentencing.

Again, I would like to thank counsel and I could have wished that I could have passed the responsibility for deciding this case to another judge or jury, but I am afraid that it came to me and I did what I honestly felt to be the right thing.

So, regardless of how strongly you all feel about it, I am not apologizing for my decision. I just want you to know that it wasn't an easy decision, and my drive over to the Presidential Women's Center was not easy because I got attacked by a bunch of ants.

But, I did explore that, too, and tried to see it from all different angles. Anyway, thank you very much.

This court will be adjourned.

MR. FOREMAN: Your Honor, I just have a question.

THE COURT: Yes, sir.

[1200]MR. FOREMAN: As far as the post-trial motions and that kind of stuff, the time frames, are you going to be around?

THE COURT: You mean is lightening going to strike me on the way home today?

MR. FOREMAN: I hope not.

THE COURT: That would be a sign that I have not done it quite right, but — I am going to be in this division until August, when I am going to be in the felony division.

So, I can set this for post-trial motions at any time that is convenient to you. You can do that with my Judicial Assistant.

I suppose that the last word in this case won't be heard for a while.

MR. FOREMAN: I guess not.

THE COURT: Thank you very much.

[Whereupon, the proceedings were concluded.]

[1201]THE STATE OF FLORIDA,)

COUNTY OF PALM BEACH)

I, Marguerite O'Brien, Court Report and Notary Public for the State of Florida at Large, do hereby certify that I was authorized to and reported the foregoing proceedings in the above-styled cause;

That the foregoing pages, numbered from 1007 to 1200, inclusive, constitute a true record of the proceedings held before the Court on March 16, 1990.

I further certify that I am not attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

WITNESS MY HAND and official seal in the City of West Palm Beach, County of Palm Beach, in the State of Florida, this 11 day of October, 1990.

/s/ MARGUERITE O'BRIEN
Marguerite O'Brien, Notary Public,
State of Florida at Large. My
My Commission Expires:

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN WESLEY MARKS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that the Petition for Writ of Certiorari in the above-styled cause was furnished to HON. ROBERT A. BUTTERWORTH, Attorney General for the State of Florida, The Capitol, Tallahassee, Florida 32399-0001, postage prepaid, by first-class United States mail, this 4th day of June, 1992.

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